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Nos. 80-1832, 80-2170, and 80-2171

IN THE

Supreme Court of the United States

October Term, 1981

Immigration and Naturalization Service, *Appellant*

v.

Jagdish Rai Chadha, et al., *Appellees*

United States House of Representatives, *Petitioner*

v.

Immigration and Naturalization Services, et al., *Respondents*

United States Senate, *Petitioner*

v.

Immigration and Naturalization Service, et al., *Respondents*

On Appeal From and Writs of Certiorari To The
United States Court of Appeals for The Ninth Circuit

**Motion for Leave to File and
Brief of Certain Members of the United States House
of Representatives, amici curiae**

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Movants ask leave to file the annexed brief as *amici curiae*. Consent has been received from Respondents Chadha, et al., Appellant Immigration and Naturalization Service, and Petitioner United States Senate. The Petitioner United States House of Representatives is the only party which withholds consent.

Movants believe that their position may be useful and distinct from other presentations, in that:

Movants, though appearing here in their individual capacities, have long experience in the House of Representatives and are vitally concerned with its process.

The three of them who are chairmen of subcommittees of the Energy and Commerce Committee of the House - Mr. Florio, Mr. Waxman, and Mr. Ottinger - are either presently involved or will likely become involved with the legislative veto question due to the jurisdictional scope of their subcommittees.

The three House Judiciary Committee members - Mr. Edwards, Mr. Kastenmeier and Mr. Conyers - are directly involved with legislation in their committee touching on the legislative veto. Each is chairman of a subcommittee of the Judiciary Committee.

The remaining three - Mr. Burton, Mr. Rosenthal and Mr. Stark - are subcommittee chairmen of the House Committees on Interior and Insular Affairs, Government Operations, and Ways and Means, respectively. All have long and intimate experience with House processes.

They respectfully request that they be permitted to file the annexed brief as *amici curiae*.

Respectfully submitted,

Robert C. Eckhardt
Attorney for Movants

Philip Burton, John Conyers, Don Edwards, James J. Florio, Robert W. Kastenmeier, Richard L. Ottinger, Benjamin S. Rosenthal, Fortney H. Stark, and Henry A. Waxman.

Belnap, McCarthy, Spencer, Sweeney & Harkaway

Of Counsel

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BRIEF OF AMICI CURIAE

The appeal in No. 80-1832 and the writs of certiorari in Nos. 80-2170 and 80-2171 all stem from the judgment and opinion

of the United States Court of Appeals for the Ninth Circuit and the proceeding there captioned *Jagdish Rai Chadha v. Immigration and Naturalization Service*, CA 9 No. 77-1702, December 22, 1980, reported at 634 F.2d 408.

The cases here on certiorari have come up on petitions for certiorari by House and Senate petitioners, granted October 5, 1981.

JURISDICTION

Jagdish Rai Chadha, appellee-respondent, instituted this proceeding in the Ninth Circuit pursuant to Section 106(a) of the Immigration and Nationality Act of 1952, 8 U.S.C., Section 1105(a), to review a final order of deportation issued against him by the Immigration and Naturalization Service. The jurisdiction of this Court has been invoked under § 8 U.S.C. Section 1254(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The various constitutional and statutory provisions *amici* deem especially pertinent to this case are:

(1) Article I, Section 1 of the Constitution.
(2) Article I, Section 7, clause 2 and 3, of the Constitution.
(3) Article I of the Constitution as a whole.
(4) Article II, Section 1, of the Constitution.
(5) Article II, Section 2, clause 2 of the Constitution.
(6) Article II, Section 3 of the Constitution.
(7) Section 244(c)(1)(2)(3) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1254(c)(1)(2)(3).

INTEREST OF AMICI CURIAE

The *amici*, Philip Burton, John Conyers, Don Edwards, James J. Florio, Robert W. Kastenmeier, Richard L. Ottinger, Benjamin S. Rosenthal, Fortney H. Stark, and Henry A. Waxman, are all members of the United States House of Representatives. They have a substantial interest in the outcome of these cases distinct from that of any of the other parties. They seek a different result from that sought by the United States House of Representatives and the United States Senate, first, in that they seek a decision on the merits, and, second, in that they urge this Court to hold that the legislative veto provision of Section 244(c)(2) of the Immigration and Nationality Act of 1952 is unconstitutional. They seek the same results in these respects as do the Immigration and Naturalization Service and Respondent Chadha, et al., but *amici's* interests are different: They do not lie particularly in the direction of the suspension of Chadha's deportation, but in protecting the bicameral process required by Article I of the Constitution and in determining at what point the legislative process assigned to them and other members of Congress by Article I of the Constitution ceases and at what point the faithful execution of the laws by the Executive begins.

This case raises the question of whether or not there is a certain limbo in cases where the delegation to the Executive partakes of a "legislative" character, i.e., of a nature which could have been appropriately exercised by Congress itself.[1]

Amici's interest in the Court's illuminating this point is not purely academic. There are, in the House alone, at least 13 bills by more than 200 authors which call for some manner of legislative veto.[2] In seven bills now before the House[3] the

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[1]See House brief, at 25: "...Congress has withheld from the Executive some part of the function of executing the whole of a statute..."

[2]H. R. Res. 97, 243, 314, 383, 458, 945, 1043, 1108, 1128, 1130, 1678, 176 and 2299, 97th Congress.

[3]H. R. Res. 97, 314, 383, 458, 945, 1128 and 1678, 97th Congress.

veto is applicable only to acts deemed by Congress, or a House of Congress, to be contrary to law, inconsistent with legislative intent or beyond the mandate to the agency.[4]

In five others, there are not guidelines for exercising the legislative veto. Thus it may be exercised on purely policy grounds. Though the bills differ in scope, the sum total of their effect would be to call upon Congress to peruse most of the seventy-five hundred or more rules, regulations and orders that emerge from the Executive branch and the regulatory agencies each year.

Four of the bills[5] permit one House, if the other does not disagree, to call up existing rules for re-promulgation. When they are re-promulgated they must be submitted to both Houses. Either can pass a resolution of disapproval in thirty days and if the other House does not pass a resolution of disagreement the rule is vetoed (the "one and a half House veto"). Or the House and Senate may pass a concurrent resolution vetoing the administrative action. This could affect any number of the rules, regulations and orders now in existence.[6] It has been estimated that House and Senate staff would have to be doubled to take care of these loads.

Amici recognize that none of these questions is directly before the Court in this case. The detailing of these bills is done only to show why *amici* have a grave and immediate

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[4]Some of these bills are more complex. For instance, H.R. 3740 provides for a "contrary to law" determination in some cases of legislative veto and a purely policy determination in the others. It then calls on the courts to make the final determination of consistency with statutory authority but assigns to the court the purely *legislative* policy determination of ascertaining whether there was any "alternative means available for implementation or enforcement of the statute."

[5]H. R. Res. 1043, 1108, 1330 and 1776, 97th Congress.

[6]From 1932 to 1978, 159 acts of Congress have contained 214 separate provisions giving the Legislative branch direct review powers. Of that number, substantially more than half have been enacted since 1970. *See* Norton, *1978 Acts Authorizing Congressional Approval or Disapproval of Proposed Executive Actions*, Congressional Research Service Report, December 21, 1978, and the same author and source, *Congressional Review, Deferral and Disapproval of Executive Actions, A Summary and Inventory of Statutory Authority*, April 30, 1976.

interest in a case which will shed light on the question of legislative veto. The nature of this legislation standing in the wings also bears upon another interest of the *amici* separate from that of the respondents and the Immigration and Naturalization Service. If the Court should heed the argument which pervades the Senate brief, that Congress has a peculiar and pervasive power over immigration matters [7], *amici* feel strongly that nevertheless the Court's decision should not be so broad as to trip the avalanche of veto resolutions in bills, an avalanche which *amici* believe would overwhelm the congressional process.

Your *amici* are sworn to uphold and support the Constitution in the same measure as is this Court. They are also obliged to determine, within constitutionally permissible bounds, the policy issues involved in legislation before the Congress. The extent of those bounds has been sharply disputed on the floor of Congress, in its committees and in the academic community, yet the matter has never before come squarely before this Court. That is why *amici* have come forward to urge that the case be decided on the merits.[8]

STATEMENT OF THE CASE

Section 241(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. Section 1251(a)(2), directs the Attorney General to deport any alien "who is in the United States in violation of this chapter." Respondent Chadha, having remained in the United States for a longer time than permitted under his admission as a nonimmigrant student, was cited by the Immigration and Naturalization Service to show cause why he should not be deported.

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[7] See Senate Brief at 31, *citing Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) and *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

[8] *Amici's* interest is in the case on the merits of the question concerning the legislative veto. Their brief, therefore, will bear only on this point. They rely on the well reasoned rationale of the Court of Appeals for the Ninth Circuit on the point of standing, justiciability and severability to the effect that the merits of the case should be reached. Realizing that respondents will further fully brief this point, it would be repetitious for *amici* to cover these issues again.

Section 244(a)(1) provides that a deportable alien, so threatened with deportation, may seek a discretionary determination by the Attorney General that deportation would result in extreme hardship, in which case the Attorney General may suspend deportation subject to a legislative veto by resolution of disapproval by either House.

The suspension was granted and the House vetoed. Thus the provision of Section 244(c)(2) of the Act was triggered. It provides that "if either House of Congress passes such a resolution, the Attorney General shall thereupon deport such alien unless he departs voluntarily." Pursuant to such provision, the immigration judge ordered that Chadha be deported to the United Kingdom. Chadha appealed to the Board of Immigration Appeals, on grounds that the veto was unconstitutional. The Board denied the appeal, finding, *inter alia*, that it had "no power to declare unconsitutional an act of Congress."

Chadha sought review of the final order of deportation in the Court of Appeals for the 9th Circuit, contending that Congress had invaded functions vested by the Constitution in the Executive branch and that therefore its action was invalid and the suspension should stand. The Appeals Court held that the issues were severable and that the Attorney General's suspension of deporation should stand. The Immigration and Naturalization Service appealed and the Intervenors (House and Senate) filed petitions for certiorari.

SUMMARY OF REASONS FOR AFFIRMING THE DECISION OF THE COURT OF APPEALS

The Court below correctly held that the resolution of disapproval which overturned the Attorney General's suspension of deportation was the exercise of a legislative veto provision which unconstitutionally intruded into the realm of executive authority in contravention of the constitutional principle of separation of powers. We agree with and support that decision but also urge that there are additional reasons why the legislative veto provision of Section 244(c)(2) violates the scheme envisaged by the Framers in Article I of the Constitution.

If the legislative veto employed in this case is not to be considered an intrusion into the executive authority, the House veto must be seen as a "legislative act." Petitioners contend that this is the correct view of the House action. The gravamen of their contention is that the issue of deportation of an alien has been in the past and continues to be a matter for legislative determination: that the Immigration and Nationality Act of 1952 purported to grant to the Attorney General certain legislative authority, but that Congress retained ultimate legislative authority to make the final decision. Under this contention, the effective legislative act was taken by the House at a time far beyond presentment and final adoption of the 1952 Act.

It is then posited that, because deportation matters are a proper subject for legislation, and because Congress has the general authority to grant or deny relief from deportation, congressional participation in the *execution* of an act which has finally passed, being legislative, is therefore not a violation of the doctrine of separation of powers.

Such misapprehends the constitutional scheme. Article I, first provides the necessary process for enacting, altering or repealing law. It protects the President's right to veto, the Executive Department's proper sphere of "executing the laws", and the Judiciary's sphere of adjudicating them.

The fact that a function delegated to the Executive Department may involve policy determinations exactly like those which Congress could have reserved to itself does not in any way authorize Congress to step beyond the stage of presentment and final enactment, and further "legislate" along with the Executive on the theory that the nature of the delegated administrative function is "legislative".

If a purported legislative act (of vetoing the Attorney General's suspension) required concurrence of both Houses (but not presentment) it would clearly be unconstitutional as being in clear conflict with Article I, Section 7 of the Constitution. (Indeed, Section 244(c)(3) provides that deportation of aliens who are deportable for criminal and other specified reasons may be suspended only upon affirmative approval by concurrent resolution of the two House of Congress.)

The presentment clause may not be avoided by purporting to give legislative effect to unicameral action (thus avoiding direct confrontation with Article 1, Section 7) because such would permit Congress to perform a legislative act in a manner not authorized by Article I.

The provisions of section 244(c)(2) are an intrusion into the realm of executive authority. As a "legislative act" altering law after presentment, they violate the concept of bicameral process envisaged in Article I.

ARGUMENT

I. The legislative veto here is an intrusion into the Executive authority and thus a violation of the doctrine of separation of powers.

History of the Act

Until the passage of the Alien Registration Act of 1940, deportation of aliens illegally within the United States was mandatory.[9] Many cases of extreme hardship occurred as a result, and these could be alleviated only by private bills. Therefore, Congress established a procedure in the 1940 Act by which the Attorney General could suspend deportation in certain categories on grounds of extreme hardship.[10] Originally, Congress reserved, or purported to reserve, the right to disapprove by concurrent resolution, but in 1952, in the present Immigration and Nationality Act, Congress provided that either House acting alone could override the Attorney General's suspension of deportation in Section 244(c)(2).[11]

The Act establishes a complete administrative procedure, quasi-judicial in nature, by which an alien may present his case to a special inquiry officer in two phases: The first involves determination of whether the statutory conditions have been met (generally involving a question of law). The second involves determination of whether relief should be

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[9]Immigration Act of 1924, Pub. L. No. 139 §14, 43 Stat. 153, 162.

[10]Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 670.

[11]Immigration and Nationality Act of 1952. 8 U.S.C. §1101.

granted (ultimately confided to the sound discretion of the Attorney General).

Chadha's Case

After having gone through this entire procedure and having been granted suspension of deportation, the fruits of Chadha's having satisfied the questions of law involved and the factual requirements of extreme hardship in the administrative proceeding were swept away by Congress' "executing its own vested legislative powers", as the House brief calls the veto action.[12]

Since no express concurrence was required, no patent violation of the presentment clause was involved. Therefore, the Court below relied altogether on the broad concept of separation of powers. The Court probed deeply into the elementary principles, because it felt such -

> ...necessary because no circuit or Supreme Court authority we have found holds that the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the Constitution which confers the power upon another branch with great specificity.[13]

Amici believe the Court was correct in determining that the veto provision constituted an intrusion into the sphere of the Executive authority so as to violate the doctrine of separation of powers.

Activity indistinguishable from that in which Congress may itself engage is often delegated to the Executive. There could be no clearer example than that involved in this case. Congress has delegated to the Attorney General the authority to make the final negative decision in a case in which the

[12]Brief of the U.S. House of Representatives at 33. The veto action is here described accurately as legislative action. As such it is not restrained as is the carefully defined process applicable to the Attorney General's authority, which must not be exercised arbitrarily or capriciously. This distinction fully answers the so-called "illogic of the Executive's position" referred to in the House Brief at 40.

[13]*Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 420 (1980).

question is whether or not "extreme hardship" is involved in a deportation order. Formerly, Congress made the affirmative decision by passing a private bill, or the negative by refusing to do so.

When the Activity Enters the Executive Sphere

The House brief brings into sharp focus the proposition that is at the kernal of the issue of constitutionality of the legislative veto. That issue is not whether the authority delegated to the Executive is inherently legislative or executive in its nature but whether the activity has been committed to the Executive by the Congress in accordance with the Constitution.[14]

Arguments concerning the "inherent nature of legislative power" go to the question of whether certain activity can be delegated at all. In the past, it has been stoutly contended that a fine distinction should be drawn between inherently "legislative" and typical "executive" activity, but such sharp distinctions in dispatching powers, for many years now, have not been looked upon with favor.[15] When power is properly delegated, there can be no distinction as to how that power is executed based upon its "legislative" characteristics. Congress can no more step into the role of executor in that case than in the case of any other function delegated to the Executive Department.[16]

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[14]Attorney General's opinion contained in letter from Benjamin R. Civiletti, Attorney General to the Hon. Shirley M. Hufstedler, Secretary of the Department of Education, June 5, 1980.

[15]*Hampton & Co. v. United States*, 276 U.S. 394 (1928): *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

[16]Robert W. Ginnane, then in the Office of the Solicitor General, makes the point very clear in *The Control of Federal Administration of Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953): "Rather than enumerating what government acts may be performed by Congress, the Constitution defines the procedure Congress must observe when it does act, regardless of whether the matter involved is said to be legislative or executive in character. *Id.* at 571-2 ... [These] doubts are not particularly engendered by any rigid classification of government acts as legislative or executive. That many acts of government may be performed with equal propriety by the legislative branch or the executive branch may be conceded. The objection is rather to the manner of the exercise of the power." *Id.* at 593.

Congress clearly has authority to allocate powers (which may be quite mixed in nature) to various agencies or to retain certain unresolved legislative issues to itself for future determination. It may also anticipate contingencies which may arise; and, if these are envisioned in the original legislation with sufficient clarity, it may provide, in specifically defined ways, conditions subsequent which may govern such contingencies and affect the application of the law.[17] Certain activity which is properly delegable may combine characteristics that are highly discretionary with characteristics of administration and adjudication (in the nature of legislation); but once Congress, by passing a law, has performed the function of allocating responsibility, the separation of powers doctrine requires that Congress not control the discharge of those functions assigned to the Executive or the Judiciary except through the legislative process of amendment or repeal.[18]

Application of Buckley v. Valeo[19]

Congress can no more retain the authority in itself to step into the executive function after it has enacted legislation which delegates authority to the Executive than it can do so by appointing an agent to participate in the execution of delegated authority.

In the Federal Election Campaign Act of 1971 Congress attempted to establish a method of appointment of the members of the Federal Election Commission in a manner different from that provided in Article II, Section 2, Clause 2 of the Constitution for appointment of "Officers of the United States". A majority of the voting members were to be appointed by the President Pro Tempore of the Senate and the Speaker of the House.

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[17]See IV, *infra*, at 18.

[18]See discussion of this view by Robert G. Dixon, Jr., *The Congressional Veto and Separation of Powers; The Executive on a Leash?* 56 No. Car. L. Rev. 423, 466 (April, 1978).

[19]*Buckley v. Valeo*, 424 U.S. 1 (1975).

Parties supporting the legislative veto in that case were not so bold as to contend that the *ordinary* legislative authority of Congress may be extended into the field of execution of the law. They contended that Congress' power to regulate elections was extraordinary. But the Court found that authority of Congress over federal election practices was not so different from other grants of authority as to permit Congress to administer it through agents who were not executive "Officers of the United States." The Court said:

> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause.[20]

Since Congress could not extend its authority into the field of execution of the law through the activity of its agents, Congress may not move into the executive field itself. The doctrine of separation of powers is violated by Congress' participating with the Attorney General in his exercise of a properly delegated administrative function (and finally overturning him) just as it would be if Congress attempted to appoint its own surrogate attorney general to perform the administrative function. Furthermore, if Congress can validly exercise the veto power, it may powerfully influence the Executive in administering the Act.[21]

II. If the veto is considered a "legislative act" it is in violation of the bicameral process mandated by Article I.

Contention that the Veto was a Legislative Act

It is said in the House brief that "... Congress in Section 244 has delegated to the Attorney General the execution of some but not all the legislative power over deportable aliens."[22]

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[20] *Id.* at 132.

[21] See discussion of this view by Robert G. Dixon, Jr., *The Congressional Veto and Separation of Powers; The Executive on a Leash?* 56 NO. CAR. L. REV. 423, 466 (1978).
Congress in the cases of five recent acts employing the legislative veto technique.

[22] House brief at 36.

The petition of the alien is there described as a "request for legislative mercy"[23] and it is said that "when either House exercises its *retained* [legislative] power under Section 244(c)(2) to pass a resolution, stating that 'it does not favor suspension of such deportation' it is exercising its own 'final and independent judgment' on the matter."[24]

Further, and most interestingly, the House brief equates the unicameral action to the bicameral process by which a private bill is enacted, saying:

> Congress has exercised exactly that kind of sovereign power in the enactment of private legislation excusing a named alien from the execution of the deportation order.[25]

At another place, the House brief states:

> The functions here said to have been invaded by the Congress, in enacting section 244(c)(2), are thus functions that lie within the power of Congress to grant or withhold in its sole discretion.[26]

But Congress did not withold delegation to the Attorney General of authority to make the "extreme hardship" determinations. In cases in which he finds no showing of "extreme hardship", authority is delegated to him to make a final and conclusive finding against the petitioner. Where he makes a determination of "extreme hardship" Congress purports to delegate to either of its Houses authority to reverse him and thus require deportation of the alien. Congress made its delegation by the regular statutory process in accordance with the bicameral requirements of Article I and subject to the presentment clause.

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[23] *Id.* at 40.
[24] *Id.* at 28.
[25] *Id.* at 37.
[26] *Id.* at 26.

Theory Underlying Delegation to a Single House

Thus, Congress has purported to authorize a single House, acting alone, to make a determination on an issue of fact and policy which has the effect of law. Under the former process, the same issue was bicamerally decided. At what point in this new process does the concurrence of the Houses take place that the alien be deported or that his deportation be suspended? Apparently it is at some point, *after* enactment of the authorizing legislation, in a " 'blended' form of government" whose core according to the House brief, is the "legislating body ... the body authorized by the Constitution to blend and mix, in statutory forms, the various powers of government, and to delegate some of its own legislative functions to Executive officers and agencies."[27]

Somewhere in this *potpourri* of powers must be found a concurrence of the House and Senate to deport Chadha if it can be said that the bicameral process mandated by Article I has been followed. There are no clear directions in the congressional briefs as to where concurrence may be found. The assumption, however, seems to be this:

Congress under Article I, Section 8, Clause 18, the Necessary and Proper Clause, may do whatever is "necessary and proper for carrying into execution the foregoing (Article I) Powers ...." The House brief deems it "necessary and proper" for Congress as a body to delegate to one of its Houses authority to make the major determination to override the Attorney General's suspension of deportation *after passage of the governing legislation* and during its engagement in the "blend and mix" of congressional functions with those of "Executive officers and agencies".

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[27] *Id.* at 24.

The Flaw in the Theory

This is a serious misapprehension of the effect of the Necessary and Proper Clause. As was said in *Buckley:*

> Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibition contained in §9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.[28]

The last line above could as well have read: "No more can it vest in itself the authority to create a 'blend and mix' of legislative and executive functions, ultimately controlled by action of one of its Houses acting alone."

There is a further flaw in the theory that the whole of Congress may delegate to one of its Houses power of exactly the same extent and scope that the whole body could exercise. Such a delegation would be unbounded by *any* standard, guideline, or even precatory admonition. As the House brief admits, the procedure here is equivalent to the action of Congress itself in enacting a private bill.

Congress can no more delegate to one of its Houses such completely uncanalized authority than it can delegate such to an agency. As Justice Rehnquist has pointed out, the proposition that Congress cannot delegate to another power to make a law is still a cardinal constitutional principle. *Field v. Clark,* 143 U.S. 649 (1982).[29] Subsequent decisions (holding that the rule against delegation of *legislative power* is not, however, so cardinal a principle as to allow for no exception) do not abrogate "the doctrine against *uncanalized* delegation of legislative power." [Emphasis added.][30]

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[28]*Buckley v. Valeo, supra,* at 135.

[29]Decision concurring in judment in *Industrial Union Department v. American Petroleum Institute,* 448 U.S. 607, 672 *et seq.* (1980).

[30]*Id.* at 675.

The authority to whom the power is delegated must be called upon to act within a field sufficiently defined "so that it may be known whether [it] has kept within it in compliance with the legislative will." *Yakus v. United States*, 321 U.S. 414, 425 (1944). If the field is the entire reach of legislative discretion, delegated from Congress to one of its Houses, there is no demarcation of the bounds of authority at all.

The effective action here is the veto of suspension of deportation by a resolution of a single House. A simple resolution of one House may not fulfil the office of "a legislative act." It may express a sense of one of the Houses or govern the House's internal affairs, but it cannot become law because it is lacking in that bicameralism that Article I demands.

III. The Veto as used here to fill the office of a "legislative act" circumvents the presentment clause.

The Point Where Legislation Ends

In the case of every act there must be a time when legislation ceases and administration begins. In the instant case there is no such dividing point. The theory of the House brief would permit Congress to continue to interfere legislatively, (i.e. change the law by successive policy decision) during the process of administration whenever the authority delegated is deemed "legislative" in nature. Under such a regime, the President's right to veto cannot be protected.

In order to satisfy the requirements of Article I of the Constitution, a bill when presented to the President must be the final work product of Congress. That is, it must not leave to Congress itself authority to alter the essential policy decisions which underlie it or to make policy decisions on facts under circumstances that arise for the first time when the legislative veto is under consideration. Such "legislative act" may not be left to a time *beyond* that at which the President has the opportunity to veto the legislation.

Effective Decision Made at Time of Veto

The policy question (of whether to suspend or not suspend Chadha's deportation) arose for the first time when the legislative veto was under consideration.

Let us suppose that the House and Senate were not opposed to the suspension. Had Congress "retained its sovereign legislative power to determine finally ... which deportable aliens should be allowed to become permanent residents of this country for reasons of 'extreme hardship' ",[31] and had it done so, such would have been by the silent acquiescence of the two Houses in the administrative determination of the Attorney General deciding in favor of suspension of deportation.

If the Senate and House may concur in this way, when is any "bill, resolution or vote" presented to the President for his approval or veto? There is no authority under Article I to legislate in this way. If there were, the legislative veto could be used by Congress as a device to place its legislative determination beyond the control of the presentment clause.[32]

In the instant case the House disapproved. Thus there was no concurrence. But a final choice was thus effectuated under the aegis of Congress' right to approve, or not, a choice in which the President had no say.

It is clear from the language of *Atkins v. United States*[33] that no such circumvention of the constitutional scheme is condoned. In that case it was said:

> *It is important to note that the one House veto is not, in the context of the present case, a device employed or available for the circumvention of the Constitution's scheme for the enactment of statutes* ... The President and the two Houses enjoy exactly the same say in what the law is to be as would have been true for each without

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[31]House brief, at 19.

[32]Ginnane, *supra* n. 16, at 596.

[33]*Atkins v. United States*, 556 F.2d 1028 (Ct. Cl., 1977), *cert. denied*, 434, U.S. 1009 (1978).

> the presence of the one-House veto, and nothing in the law is changed absent the concurrence of the President and the majority of each House ... [T]he one-House veto ... could do no more than negate the President's recommendations, leaving salary levels as they were in the existing law. [Emphasis added.][34]

In the *Atkins* case, the acquiescence of Congress could not constitute a circumvention of the President's veto power because the Salary Act of 1967 was his own recommendation. He certainly would not have vetoed House and Senate acquiescence in its passage. If one House exercised the veto, salary levels would be left as they were in the existing law; and, in order to alter such situation, a law would have to be passed under the ordinary process.[35]

The process in the Immigration and Nationality Act is different. The choice to deport or suspend deportation is left *wholly* to Congress or one of its Houses. The President cannot enter the area of law making to exercise his veto, as he could do in the case of a private bill.

IV. The constitutional requirements of bicameralism and presentment are not satisfied on grounds that the original act was properly passed.

The Condition Precedent Argument

The traditional argument for the legislative veto is that it is a mere condition precedent to an authorization made to the Executive in the original authorizing legislation. Under such a theory, it would be claimed that, as a condition precedent to the Attorney General's suspension of a deportation becoming effective, there would have to be a failure of either House to veto. This argument rests on the validity of the assumption that "unlike a new legislative act [the legislative veto] represents no inherent change in policy since it was contemplated in the enabling act."[36]

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[34] *Id.* at 1063.

[35] See Dixon's distinction of the *Atkins* case from other legislative vetoes which he considers unconstitutional, *supra* n. at 471 *et seq.*

[36] See statement of Joseph and Ann Cooper, supporters of the legislative veto, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 476 (1972).

The mere statement of the proposition demonstrates its inapplicability here, and House and Senate Counsels seem to recognize this. Accordingly, their theory, particulary as it is articulated in the House brief, is that Congress reserved until a later date an opportunity to act legislatively on the question of deportation by reserving to itself the opportunity to participate in a kind of executive partnership with the Attorney General in determining the deportation question.[37]

Inapplicability of This Argument

The House brief states:

> Thus the section 244 scheme is basically an exercise in limited delegation to the Executive of legislative and quasi-legislative functions respecting aliens ... Section 244(c)(2) in no way involves any congressional reviewer or 'veto' of vested or finalized Executive functions.[38]

Thus House counsel eschewed the theory that the action is a "legislative veto" exercised as a condition precedent to Executive action. It is clear why counsel was forced to do so. The condition precedent argument simply does not fit this case because the determination in favor of deportation is not merely subordinate or incidental to a policy determination underlying the previously enacted law.[39] Rather it is an exercise of an independent legislative determination, just like a decision not to proceed with a private bill to suspend deportation.

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[37]The practice in the House is that the Attorney General makes his decision, and then the staff on the Judiciary Committee analyzes it and makes the report ultimately resulting in a recommendation of the Judiciary Committee. The final determination in the negative is exercised by the House.

[38]House brief at 19.

[39]See Ginnane, *supra* n. 16 at 593-4: "But it is clear that the policy decisions ... that have been described - for example, ... the termination of the Attorney General's suspension of deportation of an alien ... are indistinguishable from the policy decisions and legal consequences of ordinary legislation."

Senator Javits and Mr. Klein, who support the validity of the legislative veto in some cases but not others, draw the line of demarcation this way: If "the post enactment congressional review is subordinate or incidental to previously enacted law [which was subjected to the presentment clause process] rather than an independent exercise of the legislative power," the provisions of Article I, Section 7 are not violated. But, as those writers concede, "[n]ot all variations of the legislative veto would necessarily preserve the functions of the presentation clause .... If the consequence of a legilative veto provision were the implementation of a congressional purpose free of presidential participation, the logic would break down."[40]

The questions to be asked under this theory are stated by Javits and Klein as follows:

> Is the character of the action by Congress an independent exercise of legislative power, or is it incidental or subordinate to legislation? Is the effect of the action to implement a congressional purpose free from presidential control, or is it in pursuance of a primary legislative scheme properly enacted?[41]

If it is the former, the legislative veto provision is unconstitutional; if, the latter, the provision is constitutional according to this argument.

The Senate's position on the facts is not different from that of the House. It treats the Immigration and Nationality Act and its establishment of the suspension process as having made "the executive an important participant in the process of granting relief",[42] and as having reserved in Congress the authority to act legislatively upon broad discretionary grounds. Thus the Senate brief quotes with approval an earlier decision of the Ninth Circuit relating to the process involved here in which it was said:

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[40]J. Javits and G. Klein, *Congressional Oversight and the Legislative Veto, A Constitutional Analysis*, N.Y.U. L. REV. 455, 484 (1977).

[41]*Id* at 485.

[42]Senate brief at 29.

> [W]e do not construe the committee's report as an effort by the Committee to tell the Attorney General how he should exercise the discretion delegated to him by Section 1254(a)(1). Rather, it is an explanation for the Committees having exercised the discretion committed to it by Section 1254(c)...[43]

But at this point the path of the Senate brief diverges from that of the House. On page 32 it states:

> The approval or disapproval by the Congress or by one of its Houses under a statute providing for legislative review is not an act of lawmaking. The requirements of bicameralism and presentation are fully satisfied by enactment of the underlying statute authorizing legislative review.

The House brief construes the effect of Section 244 in a quite different way. It states at page 28:

> At no point in Section 244 has Congress delegated to the Attorney General or the INS any final power to determine which illegal aliens should be allowed to remain in the United States for reasons of 'extreme hardship' to the alien or his family. Congress has retained that power unto itself as part of its 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden' .... And when either House exercises its retained power under Section 244(c)(2) to pass resolution stating 'that it does not favor the suspension of such deportation,' it is exercising *its own final and independent judgment on the matter. [Emphasis added.]*

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[43] *Id.* at 30.

What is an act of "final and independent judgment" on such a matter if it is not "lawmaking"?

When Congress purports to delegate to either of its Houses the authority to make an "independent judgment" as to whether an alien has "characteristics which Congress has forbidden", such is not a determination which is "incidental and subordinate" to the original legislation. It may not be considered as having been determined in the original legislation and thus made subject to bicameral process and review. Such post-enactment legislative review is clearly "an independent exercise of legislative power" and the House brief with commendable candor admits it to be so. But since this is so, it can neither escape the normal processes of legislative enactment nor ride through them on the back of the original authorizing legislation.

The conclusion of the Senate and House briefs, considered together, is that Congress may reserve to itself not only legislative authority "incidental or subordinate" to the original legslation, but also legislative authority which is "an independent exercise of legislative power."

Suppose suspension of deportation of a Polish National who was temporarily residing in this country was extremely important to the State Department under the specific facts adduced in the suspension of deportation hearing before the Attorney General. Suppose, though, for some reason, perhaps because of his nominal Communist party membership, one of the Houses of Congress elected to override the suspension by a one-House veto which is not subject to the presentment clause. Certainly such is "the implementation of congressional purpose free of presidential participation", and thus it would be unconstitutional.[44]

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[44]Joseph and Ann Cooper, who support the constitutionality of the legislative veto generally, do not go so far as do the House and Senate in their briefs. They say only: "If the legislative veto can be said to be ancillary to legislation and not legislation per se, and if therefore the veto can be accepted as properly exercisable by the Congress as a whole, then it would seem to be permissible for it to delegate the power to some part of Congress [Emphasis added]. J. Cooper & A. Cooper, *supra* n. 36 at 477.

The "post-enactment legislative review" involved in the instant case is clearly an unconstitutional "implementation of Congressional purpose free of presidential participation."

Conclusion

In delegating authority to the Executive, Congress has broad latitude between retaining for itself the determination of policy matters which may later arise and, on the other hand, relinquishing such determination to the Executive. But that choice must be made in legislation enacted under the process prescribed in Article I.

Congress may not both delegate significant policy determination substantially independent from the issues actually addressed in the orignal act and at the same time reserve its "legislative" function to control it.

To do so always transgresses the presentment clause and the doctrine of separation of powers. When an act purports to permit one House to veto executive action based upon an unbounded policy judgment, such an act also violates the Constitution's requirement of bicameralism and its prohibition against delegating lawmaking authority - the power to legislate after the act is in the executive sphere. Such is the nature of the authority sought to be exercised here through use of the one-House veto.

There are practical reasons why the Constitution prevents the Houses of Congress from stepping across the line marked by presentment and final enactment of an act. Congress performs best when it deals with principles. It is least well-equipped to act on individual applications of law. There it is most pressed by narrow special interests. *Amici* see this constitutional separation as a protection, not as a hinderance.

Amici urge that the judgment of the Court of Appeals for the Ninth Circuit be in all things sustained.

Respectfully submitted,

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